

protection constitutionally afforded to Article III judges. Relying on that reference, the district court held that the mere existence of sixty-five-year-old statutory authority for removal of a Comptroller General suffices to invalidate the Comptroller General's functions under the Deficit Control Act. In the opinion of the district court, "it is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subser-vience to another branch that raises separation-of-powers problems." App. at 30a (footnote omitted).

Accordingly, the court rejected the contention that, because the Budget and Accounting Act of 1921 established only a procedure for consideration of a possible future enactment of the Congress, it would be only the future enactment of a removal resolution, and not the previously established procedures, that would create a controversy requiring adjudication of the removal provision. The district court decided that "[i]t is the prior assertion of authority to remove embodied in the tenure statute that has the immediate effect, and presumably the immediate purpose, of causing the Comptroller General to look to the legislative branch rather than the President for guidance." App. at 31a.

The district court consequently reached the constitutional question whether an officer who performs administrative tasks may be removed by statute. First, the court held that the Deficit Control Act assigns the Comptroller General executive functions. Id. at 43a-44a. Then, interpolating between this Court's decisions in Myers v. United States, 272 U.S. 52 (1926), and Humphrey's Executor v. United States, 295 U.S. 602 (1935), the district court held that "congressional removal power cannot be approved with regard to an officer

who actually participates in the execution of the laws." App. at 46a. Accordingly, the court concluded that, because the Deficit Control Act confers executive duties upon the Comptroller General, which could not be performed by an officer subject to removal by an act of Congress, "those powers cannot be exercised and therefore the automatic deficit reduction process to which they are central cannot be implemented." Id. at 48a.

In the order accompanying its opinion, the district court declared the automatic deficit reduction process established by the Deficit Control Act "unconstitutional on the ground that it vests executive power in the Comptroller General, an officer removable by Congress." Id. at 52a. The court further declared that the President's February 1 sequestration order is "without legal force and effect." Ibid. Finally, the court ordered that its judgment is "without prejudice to implementation of the alternate deficit reduction process specifically set forth in section 274(f) of the Act to cover the eventuality of the invalidation," and it stayed the effect of its judgment pending the resolution of appeals, in accord with section 274(e) of the Act. Ibid.

THE QUESTION IS SUBSTANTIAL

These appeals present a substantial question that merits plenary review for the following reasons.

1. The Congress determined in the Deficit Control Act that the economic welfare of the nation required the establishment of an administrative mechanism to promote steady progress to reach a balanced budget by fiscal year 1991. The Congress also determined that the appropriate officer of the United States to make the estimates and calculations that are required in implementing this mechanism is the Comptroller

General, who is appointed by the President by and with the advice and consent of the Senate. The Comptroller General's knowledge of and experience with the financial accounts of the federal government and independence from the political control of the President and the Congress make him ideally suited to implement neutrally the hard political choices that the Congress and the President agreed to in enacting and approving the legislation.

The district court sustained the constitutionality of the Act's administrative mechanism against a challenge that the Congress had unconstitutionally delegated its legislative authority. Nevertheless, the district court rendered the central administrative mechanism of the Act inoperable by holding that the Congress may not delegate responsibility to the appointee of the President who it had concluded is the most suitable recipient of those responsibilities. Although the Congress has provided for an alternative means to effectuate the objectives of the Act, the existence of the alternative does not diminish the gravity or the delicacy, Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J.), of the district court's decision to hold unconstitutional the means that the Congress concluded would be the most effective to achieve the objectives of this important enactment.

2. Plenary review is necessary also to consider the impact of the district court's decision on the critical role of the Comptroller General in preserving the integrity of the federal government's financial accounts. Since 1921 the Comptroller General has had the statutory duty to "settle all accounts of the United States Government and supervise the recovery of all debts finally certified by the Comptroller General as due the Government.... On settling an account of

the Government, the balance certified by the Comptroller General is conclusive on the executive branch of the Government." 31 U.S.C. 3526(a), (d). This responsibility for assuring compliance by the executive departments with statutory restrictions on public expenditures derives from the Budget and Accounting Act of 1921, which created the General Accounting Office and included the removal provision that is the subject of these appeals. The breadth of the district court's ruling places in question the basic historical responsibilities of the Comptroller General and thereby intensifies the need for plenary review.

To the extent that the final adjudication of this appeal requires a choice between the removal provision of the Budget and Accounting Act and the executive functions of the Comptroller General, this Court will be presented with a question of severability, which "is largely a question of legislative intent." Regan v. Time, Inc., 104 S.Ct. 3262, 3269 (1984) (plurality opinion). Plenary review will provide an opportunity to consider Congress' intent in the Deficit Control Act in the context of, rather than in isolation from, its purpose in creating the Comptroller General's office in 1921. In concluding that the removal provision in the 1921 Act cannot be reconciled with the executive nature of the duties delegated to the Comptroller General in the Deficit Control Act, the opinion of the district court gives no consideration to the legislative history and purpose of the 1921 Act, which both created the Comptroller General's office and gave it executive functions. As a result, the court effectively eviscerated the Comptroller General's executive functions, without even considering Congress' original intent in establishing the office, which had been precisely to

enable the Comptroller General to perform executive functions independently of the control of any other officer.

3. Plenary review would also promote adherence to the fundamental principles that have guided this Court's understanding of the Appointments Clause. In Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), this Court explicitly recognized that the manner of the Comptroller General's appointment renders him an "Officer of the United States," pointing out that the Comptroller General is "appointed by the President in conformity with the Appointments Clause." Id. at 128 n.165. The district court gave little weight to the constitutional method of the Comptroller General's appointment and instead placed overriding importance on the existence of an unused, untested, and, if necessary, severable provision of the Budget and Accounting Act of 1921.

The removal provision of the Budget and Accounting Act of 1921 establishes procedures by which a future Congress may consider the removal of a Comptroller General. Congress enacted the removal provision in the 1921 Act several years before this Court decided the cases -- Myers v. United States, 272 U.S. 52 (1926), and Humphrey's Executor v. United States, 295 U.S. 602 (1935) -- that the district court relied upon to invalidate the Comptroller General's duties under the Deficit Control Act. If there ever were a proposal in Congress to use the procedures in the 1921 Act to remove a Comptroller General, the vitality of the removal provision assuredly would be scrutinized within the Congress in the light of this Court's decisions subsequent to the 1921 Act. As a coordinate branch with its own responsibility to act consistently with the Constitution, the Congress would then be required to address the question whether the 1921 removal

provision survived this Court's subsequent removal decisions. Nevertheless, the district court held that the mere existence of the unused sixty-five-year-old provision demonstrates by itself Congress' intent so to control the Comptroller General's performance of his duties as to disable him from performing the important functions that the Congress has assigned to him in the Deficit Control Act. The district court's holding ignored this Court's admonition that questions over the propriety and effect of a removal statute are premature until "the question ... should be inevitably presented" by the use of the statute to remove an officer. Myers v. United States, 272 U.S. at 173. Plenary review should be granted to review the district court's novel departure from the Appointments Clause jurisprudence of this Court and from sound principles of judicial restraint.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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February, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPRESENTATIVE MIKE SYNAR,
et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant,

UNITED STATES SENATE,
SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF
THE UNITED STATES HOUSE OF REPRESENTATIVES,
COMPTROLLER GENERAL OF THE UNITED STATES,

Intervenors.

C.A. No. 85-3945

NATIONAL TREASURY EMPLOYEES UNION,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant,

UNITED STATES SENATE,
SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF
THE UNITED STATES HOUSE OF REPRESENTATIVES,
COMPTROLLER GENERAL OF THE UNITED STATES,

Intervenors.

C.A. No. 85-4106

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that intervenor United States Senate hereby appeals to the Supreme Court of the United States from the final order and judgment entered in this case on February 7, 1986, declaring unconstitutional certain

provisions of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, and providing other relief.

This appeal is taken pursuant to 28 U.S.C. § 1252 and section 274(b) of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177.

Respectfully submitted,

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Dated: February 7, 1986

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served by hand delivery with three copies of the Jurisdictional Statement of the United States Senate on February 18, 1986:

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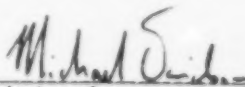
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